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October 24, 1996

VIA HAND DELIVERY

William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Mail Stop Code 1170  
Washington, DC 20554

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OCT 24 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Re: Notification of *Ex Parte* Meeting  
WT Docket No. 96-18, Market Area Licensing for  
Common Carrier and Private Carrier Paging


Dear Mr. Caton:

Kathleen Q. Abernathy, on behalf of AirTouch Paging ("AirTouch"), and the undersigned, on behalf of Arch Communications Group, Inc. ("Arch"), met with Michelle Farquhar, Chief, Wireless Telecommunications Bureau, and Rosalind K. Allen, Deputy Chief, Wireless Telecommunications Bureau, on Wednesday, October 23, 1996 to discuss issues raised in AirTouch's and Arch's Comments and Reply Comments filed in the above-referenced proceeding on March 18, 1996 and April 2, 1996, respectively. Attached are copies of the handouts distributed at the meeting.

Please contact Kathleen Q. Abernathy at (202) 293-4960, or the undersigned at (202) 783-4141, should you have any questions or require additional information concerning this matter.

Sincerely,

WILKINSON, BARKER, KNAUER & QUINN

  
by: Kathryn A. Zachem

cc: Kathleen Q. Abernathy  
Paul H. Kuzia  
Mark A. Stachiw

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October 23, 1996

# Memorandum

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**RE:           Modification of Auction Rules and Procedures**

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The Commission has specifically retained the authority to modify its auction rules on a service-by-service basis. Language making this point is set forth in both the *Auction Second Report and Order*<sup>1</sup> adopted in the general auction proceeding (Docket 93-253), as well as the Commission's auction rules.

Section 1.2103(a) of the rules provides that "[t]he Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis."<sup>2</sup> In the *Auction Second Report and Order*, the Commission states that it is committed to adapting auction rules to accommodate the particular characteristics of the radio service involved.<sup>3</sup> The *Auction Second Report and Order* establishes a "range of competitive bidding methods and auction procedures from which [the Commission] will choose for auctionable services. Because as yet the Commission has no actual experience with auctions, [the Commission] **will retain the ability to select among procedures deemed appropriate for each service.** This course . . . complies with the Congressional directive that [the Commission] 'design and test multiple alternative methodologies under appropriate circumstances.'"<sup>4</sup>

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<sup>1</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Auction Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Auction Second Report and Order*").

<sup>2</sup> 47 C.F.R. § 1.2103(a). With respect to narrowband PCS licensing, for example, the Commission's rules provide that single round sealed bid auctions (either sequential or simultaneous), sequential oral auctions, and simultaneous multiple round auctions are possible auction designs. 47 C.F.R. § 24.302(a). The rules also provide, however, that "the Commission may design and test alternative procedures." 47 C.F.R. § 24.302(b).

<sup>3</sup> The Commission notes that competitive bidding is particularly well-suited, and will be used, to resolve instances of mutual exclusivity in those services employing first-come, first-served application procedures such as common carrier services generally, and Public Mobile services specifically. *Auction Second Report and Order*, at ¶ 17.

<sup>4</sup> *Auction Second Report and Order*, at ¶ 9 (emphasis added) citing Section 309 (j)(3) of the Communications Act.

The Commission specifically stated in the *Auction Second Report and Order* that with respect to future auctions, it would devise “specific rules within the scope of these general rules . . . for each service subject to competitive bidding. These subsequent Reports and Orders will set forth specific competitive bidding rules for each service that meets the criteria in Section 309(j)(2).”<sup>5</sup> For example, in its recent *Sixth Memorandum, Opinion and Order* adopted in the general auction proceeding,<sup>6</sup> the Commission:

- “retain[ed] the discretion in IVDS auctions to vary the minimum bid increments for individual licenses, or groups of licenses, at any time before or during the auction.”<sup>7</sup>
- “retain[ed] the discretion to use a hybrid stopping rule or to allow bidding to close individually . . . .”<sup>8</sup>
- “retain[ed] the discretion to declare at any point after 40 rounds that the auction will end after some specified number of additional rounds.”<sup>9</sup>
- “reserve[d] the discretion to set and by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage.”<sup>10</sup>
- “retain[ed] the discretion to announce during the course of an auction when, and if, the auction will move from one round to the next.”<sup>11</sup>

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<sup>5</sup> *Auction Second Report and Order*, at ¶ 10. Section 309(j)(2) provides that the Commission may use competitive bidding to select between mutually exclusive applications where: (1) the principal use of the spectrum involves, or is likely to involve, the licensee receiving compensation from subscribers in return for which the licensee enables those subscribers to transmit or receive communications signals on frequencies which the licensee is licensed to operate, or (2) a system of competitive bidding will promote the objectives described in Section 309(j)(3).

<sup>6</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Sixth Memorandum, Opinion and Further Notice of Proposed Rule Making*, PP Docket No. 93-253, FCC 96-330 (rel. Sept. 10, 1996).

<sup>7</sup> *Id.* at ¶ 19.

<sup>8</sup> *Id.* at ¶ 21.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 25.

<sup>11</sup> *Id.* at ¶ 26.

- “retain[ed] the discretion to issue additional rule waivers during the course of an auction for circumstances beyond a bidder’s control . . . .”<sup>12</sup>

After finding that an “analysis of the record in [the competitive bidding] proceeding [demonstrated] that there is no single competitive bidding design that is optimal for all auctionable services . . . ,”<sup>13</sup> the Commission repeatedly expressed its intention throughout the *Auction Second Report and Order* to adopt a flexible approach to service-specific auction rules so as to accommodate the peculiarities of the individual services as well as various

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<sup>12</sup> *Id.* at ¶ 29. For additional examples of this and similar language, *see also* Amendment of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz, *Second Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 11 FCC Rcd 188 (1995); Amendment of Parts 21 and 74 of the Commission’s Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589 (1995); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7684 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Memorandum, Opinion and Order*, 9 FCC Rcd 6858 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS and Amendment of the Commission’s Rules to Establish New Narrowband Personal Communications Service, *Third Memorandum, Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Report and Order*, 9 FCC Rcd 2941 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

<sup>13</sup> *Auction Second Report and Order*, at ¶ 68.

other policy concerns.<sup>14</sup> For example:

- The Commission stated that it “intend[s] to tailor the auction design to fit the characteristics of the licenses that are being auctions.”<sup>15</sup>
- The Commission also states that it “may decide in the future to alter some or all of the [general] procedures detailed [in the *Second Report and Order*], or to tailor them to specific service rules, after [it has] had an opportunity to assess their effectiveness.”<sup>16</sup>
- The Commission states that it “may decide in some services to accept applications before scheduling an auction. This will be the case in services where mutually exclusive applications are filed during filing windows that open automatically by operation of our Rules. In these situations, [the Commission] will provide through a subsequent Public Notice relevant information concerning the auction in which these licenses will be awarded.”<sup>17</sup>
- Furthermore, “it is also important to award licenses to the appropriate parties rapidly, since the sooner the licenses are awarded to the parties that value them most, the sooner new service is likely to be available, and the sooner consumers will benefit from competition among new suppliers and between new suppliers and incumbent firms. We therefore seek to employ bidding procedures that can be implemented efficiently and within a reasonable time period.”<sup>18</sup>

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<sup>14</sup> See generally, *Auction Second Report and Order*, discussion at ¶ 68.

<sup>15</sup> *Auction Second Report and Order*, at ¶ 112.

<sup>16</sup> *Id.* at ¶ 164, n.120.

<sup>17</sup> *Id.* at ¶ 164, n.121.

<sup>18</sup> *Id.* at ¶ 77.

October 23, 1996

# Memorandum

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**RE:            Scope of Section 309(j)**

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The Commission's authority to auction frequencies is set forth in Section 309(j) of the Communications Act of 1934, as amended (the "Act"). Specifically, Section 309(j) of the Act states:

- The Commission has general authority to use competitive bidding to grant licenses or permits to qualified applicants "[i]f mutually exclusive applications are accepted for filing for any initial license or construction permit which will involve a [defined] use of the electromagnetic spectrum . . . ." <sup>1</sup>
- "For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances." <sup>2</sup>
- "In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum . . . ." <sup>3</sup>
- "In making a decision pursuant to Section 303(c) [general licensing power of the Commission] to assign a band of frequencies to a use for which licenses or permits will be issued pursuant to this subsection, and in prescribing regulations pursuant to paragraph (4)(C) of this subsection, the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding . . . ." <sup>4</sup>

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<sup>1</sup> Section 309(j)(1).

<sup>2</sup> Section 309(j)(3).

<sup>3</sup> *Id.*

<sup>4</sup> Section 309(j)(7)(A).

- **“Nothing in this subsection or in the use of competitive bidding, shall . . . be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiations, threshold qualifications, service regulations, and other means to avoid mutual exclusivity in application and licensing proceedings . . . .”<sup>5</sup>**

The legislative history of Section 309(j) clearly evidences Congressional intent to limit the Commission’s auction authority to those situations in which mutual exclusivity can not be avoided.<sup>6</sup> Specifically:

- **“Under the terms of the Conference Agreement, competitive bidding procedures would be utilized for a limited number of licenses. These procedures will only be utilized when the Commission accepts for filing mutually exclusive applications for a license, and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers.”<sup>7</sup>**
- **“The [Commission’s competitive bidding] authority would apply only when there are mutually exclusive applications for an initial license for a use described in subsection 309(j)(2) . . . . The Committee’s extensive record reveals that there are limited cases in which competitive bidding would be appropriate and in the public interest. The limited grant of authority contained in this section is designed so that only those classes of licenses would be issued utilizing a system of competitive bidding.”<sup>8</sup>**
- **“The licensing process, like the allocation process, should not be influenced by the expectation of federal revenues and the Committee encourages the Commission to avoid mutually exclusive situations, as it is in the public interest to do so.”<sup>9</sup>**

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<sup>5</sup> Section 309(j)(6)(E).

<sup>6</sup> It is also noteworthy that “the Committee expects the Commission to match auction methodologies with the characteristics of the service.” Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, H.R. Rep. No. 103-111, at 254, *reprinted in* 1993 U.S. C.C.A.N. 378, 580.

<sup>7</sup> Omnibus Budget Reconciliation Act of 1993, H.R. Conf. Rep. No. 103-213, at 481.

<sup>8</sup> H.R. Rep. No. 103-111, at 253.

<sup>9</sup> H.R. Rep. No. 103-111, at 258. A September 27, 1996 Letter from the House Commerce Committee to Reed Hundt supports the conclusion that Congress did not intend to

- **“The FCC has and currently uses certain tools to avoid mutually exclusive licensing situations, such as spectrum sharing arrangements and the creation of specific threshold qualifications, including service criteria. These tools should continue to be used when feasible and appropriate.”<sup>10</sup>**

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give the Commission carte blanche auction authority, and that mutual exclusivity situations should be resolved by means other than auctions whenever possible. According to the letter, signed by the Chairman and over 20 members of the Committee, Congress stipulated in the Omnibus Budget Reconciliation Act of 1993 “that auctions should be used only when mutually exclusive applications can not be avoided by other means, such as sharing and employing engineering techniques.” *See* Letter from Chairman, House Commerce Committee to Federal Communications Commission Chairman Reed Hundt, Sept. 27, 1996.

<sup>10</sup> H.R. Rep. No. 103-111, at 258-59.



## **Requiring modest deposits on a license-by-license basis**

- Will help identify licenses with a single seriously interested party
  - allows those to be issued immediately
- Permits non-mutually exclusive licenses to be issued prior to auction
  - there may be many of these because of incumbents
  - thereby reducing the number of licenses auctioned, expediting the issuing of licenses
- Can be applied only to substantially encumbered spectrum
  - e.g. 50% or more pops already served
- May be less than \$2,500 or \$.02/activity unit
  - but payment for desired eligibility still applies

**Closing those licenses that do not obtain more than one bid after a specified number of rounds will not harm the simultaneous closing rule**

- if two bidders both want a license, both can bid to keep license in play
- eliminates licenses with only one active interest
- others can close simultaneously
- suggest 5-10 rounds for a reasonable "close with no activity"
- useful given large number of licenses to be issued

## **Modest buildout Requirements are pro-competitive**

- Competitors may try to block expansion of existing incumbents
- Anticompetitive use would involve slow or no development
- A one-year ten percent requirement will reduce anticompetitive behavior
  - without harming procompetitive use as procompetitive use involves buildout

## **Buildout requirements should be specified clearly**

- Substantial Coverage should have a clear definition
- It should apply at all points in time as population coverage requirement
  - so that it isn't used to warehouse spectrum
  - five year delay is haven for anticompetitive use of spectrum